

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1173-2010
vs. :
 : CRIMINAL DIVISION
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 :
 :
 : 1925(a) Opinion
GREGORY A. BARTO,
Defendant

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Order entered November 8, 2011, which summarily denied Appellant's second motion to dismiss that was filed on October 13, 2011 and was captioned "Second Motion to Bar Subsequent Prosecution." The relevant facts follow.

Appellant was charged with six counts of criminal conspiracy to commit various offenses, including involuntary deviate sexual intercourse, statutory sexual assault, aggravated indecent assault, sexual assault, indecent assault and rape; two counts of unlawful communication or contact with minors; two counts of corruption of minors; one count of rape; one count of endangering the welfare of children, one count of indecent exposure; one count of indecent assault and one count of sexual assault. These charges relate to alleged criminal conduct against K.P. and K.W., minor females who worked for Appellant and his wife in 2003 and 2006-2007, respectively.

On March 24, 2011, Appellant filed a motion to dismiss based on section 110 of the Crimes Code, 18 Pa.C.S. §110. More specifically, Appellant asserted the present

prosecution should be barred because Appellant was formerly prosecuted and convicted of offenses allegedly arising from the same criminal episode and the present offenses were known to the appropriate prosecuting officer at the time of the commencement of the first trial. Although the motion was not filed within thirty days after arraignment, the Court heard the motion over the Commonwealth's objection in the interests of justice.

Appellant was in fact prosecuted and convicted following a jury trial in May of 2010 at the following criminal Informations: CR-1079-2008; CR-110-2009; CR-844-2009; CR-896-2009; CR-1601-2009; and CR-1632-2009. The affidavits of probable cause for these cases were introduced into evidence and marked as Appellant's Exhibit No. 2.

In summary, Appellant engaged in conduct, along with his wife, over nearly a decade which involved soliciting minor girls, most of whom had worked for him at his tire shop, to use alcohol and /or illegal substances such as cocaine and marijuana and then either convincing them or forcing them to participate in one or more of the following activities: viewing pornography, making pornographic videos, engaging in sexual relations with Appellant, engaging in sexual relations with Appellant's wife, and engaging in sexual relations with both Appellant and his wife. Appellant was convicted of numerous charges including, but not limited to, forcible rape, sexual assault, indecent assault, conspiracy, and corruption of minors.

Although the current offenses occurred in some of the same years as those previous offenses, none of the offenses in those cases involved the victims in this case.

It was conceded by the Commonwealth at the hearing on the motion to dismiss that the current offenses were known to the appropriate prosecuting officer at the

time of the commencement of the trial on the prior charges.¹ Accordingly, the only contested issue for the motion to dismiss was whether the present offenses arose from the same criminal episode as the previous offenses.

On May 19, 2011, the Court issued an Opinion and Order denying the motion to dismiss, finding that the offenses were not part of the same criminal episode.

On June 8, 2011, Appellant's former counsel filed a motion to withdraw, which the Court granted on July 28, 2011, and Appellant's current counsel entered his appearance on August 1, 2011.

On October 13, 2011, Appellant filed a second motion to dismiss, again asserting that the current offenses were part of the same criminal episode as the former offenses. On November 8, 2011, the Court entered an Order summarily denying this second motion, noting that the second motion raised the same issue as the previous motion to dismiss and rejecting Appellant's assertion that "new evidence" justified another hearing on this issue.

Appellant appealed the Court's denial of his second motion to dismiss on November 21, 2011. Appellant raises five issues on appeal: (1) the trial court erred when it denied Appellant's first motion to dismiss; (2) the trial court erred when it denied Appellant's second motion to dismiss; (3) the trial court erred by failing to consider the Commonwealth's binding judicial admission that Appellant's acts constituted a common plan, scheme or design; (4) the trial court erred by finding that the second motion to dismiss

¹ From the affidavit of probable cause, as well as the portions of the police reports attached to Appellant's second motion to dismiss, it appears that the police became aware of K.W. as a potential victim in 2008 during their investigation of the charges against S.H., the victim in case numbers 1079-2008 and 896-2009. In comparison, it appears that K.P. was first interviewed on or about April 12, 2010, less than one month prior to the trial in the previous cases.

raised the same issue as the first motion to dismiss because the second motion included new facts in the form of the Commonwealth's judicial admission that were not in existence at the time the first motion was filed; and (5) the trial court erred by finding that acts that are part of a common plan can constitute separate criminal episodes for purposes of compulsory joinder under 18 Pa.C.S. §110. As issues 4 and 5 are related to the reasons the Court gave for denying Appellant's second motion to dismiss, the Court will address them in its discussion of Appellant's second and third issues.

Appellant first asserts that the trial court erred when it denied Appellant's first motion to dismiss. The Court cannot agree.

The Court denied Appellant's first motion to dismiss in its Opinion and Order entered May 19, 2011. Appellant did not file his appeal until November 21, 2011. Since Appellant did not file an appeal within thirty days of the Opinion and Order denying his first motion to dismiss, this issue is waived. In fact, the Court questions whether the second motion was merely a thinly veiled attempt by Appellant to reincarnate his right to appeal before trial.

Even if this issue was not waived, the Court cannot agree with Appellant. The "compulsory joinder rule" set forth in section 110 of the Crimes Code has a dual purpose. First, it protects a person accused of crimes from governmental harassment by being forced to undergo successive trials stemming from the same criminal episode. Second, it ensures judicial economy. Commonwealth v. Spotz, 563 Pa. 269, 759 A.2d 1280, 1285 (2000); Commonwealth v. Hude, 500 Pa. 482, 458 A.2d 177, 180 (1983).

A single criminal episode analysis is a totality of the circumstances analysis. Commonwealth v. Schmidt, 919 A.2d 241, 246 (Pa. Super. 2007); Commonwealth v. M.D.P.,

831 A.2d 714, 719 n.3 (Pa. Super. 2003). The courts consider the logical and/or temporal relationship between the charges, whether the charges share common issues of law, whether the charges share common issues of fact, whether separate trials would involve substantial duplication and whether separate trials would be a waste of scarce judicial resources.

Schmidt, supra.

The Court found that this case was most analogous to the case of Commonwealth v. M.D.P., supra. In M.D.P., the defendant had pled guilty to two counts of indecent assault involving one of his minor sons, which occurred between June 1, 2000 and July 16, 2000. Prior to the defendant pleading guilty, the police met with the defendant and he admitted to inappropriate sexual contact with his two other sons. Subsequently, the defendant was charged with numerous sexual offenses against his other sons, including rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, incest, and corruption of minors. Not unexpectedly, the defendant filed a motion to dismiss pursuant to 18 Pa.C.S.A. §110, claiming this second prosecution was barred because the police were aware of the defendant's conduct prior to his guilty plea in the first prosecution.

The Superior Court concluded that the two cases presented different legal questions and different facts because they relied on different victims, different witnesses and contained different evidence. Therefore, the two prosecutions were not logically related and did not constitute a single criminal episode.

The same is true in connection with Appellant's cases. While there may be some duplication of legal issues because of the similarity of some of the charges, those legal issues clearly relate to different factual scenarios. Indeed, the pertinent facts in each case

differ. The specifics of the alleged incidents are unique to each victim, and only the specific victims could testify as to the crimes at issue. While the conduct can generally be characterized as sexual assault, the evidence relating to the prosecutions is different. Furthermore, there are some different charges in each case. This is the first case where Appellant was charged with endangering the welfare of children. Similarly, Appellant was charged in the previous case with terroristic threats, sexual exploitation of children, sexual abuse of children, possession of a small amount of marijuana for distribution but not for sale, possession with intent to deliver cocaine and conspiracy to deliver cocaine, none of which are charged in this case. As in M.D.P., the cases present different legal questions and different facts. See also Spotz, supra; Commonwealth v. Bracalielly, 540 Pa. 460, 650 A.2d 755 (1994); Schmidt, supra; Commonwealth v. Lee, 435 A.2d 620 (Pa. Super. 1981). Accordingly, the Court did not hesitate in concluding that the present charges did not involve the same criminal episode as the former charges to which Appellant was previously found guilty.

Appellant next asserts the trial court erred when it denied Appellant's second motion to dismiss. Again, the Court cannot agree.

Initially, the Court questioned Appellant's ability to file a second motion to dismiss. Appellant claimed he could file such a motion because the Commonwealth's appellate brief from the former case, which was filed after the Court ruled on the first motion to dismiss, was new evidence and constituted a judicial admission that Appellant's acts constituted a common plan, scheme or design. The Court disagreed. It noted that the second motion raised the same issue as the first motion and the issue of the acts against the different victims in the previous cases being admissible on the basis of a common plan, scheme or

design, was available to Appellant and his prior attorney long before the Commonwealth filed its appellate brief.

Both motions to dismiss were based on 18 Pa.C.S. §110 and an argument that the previous offense and the current offenses were part of a single criminal episode. Therefore, both motions involved the same issue.

Regardless of whether the Commonwealth utilized the phrase “common plan, scheme or design” in its previous court filings in both the previous cases and the current case, Appellant’s argument that the offenses constituted a single criminal episode because they were all part of the same common plan or scheme was available to Appellant long before the Commonwealth filed its appellate brief. When the Commonwealth filed its motion to consolidate the previous cases, it noted similarities between the cases and asserted the evidence of each of the offenses would be admissible in a separate trial but would be capable of separation by the jury. See Commonwealth’s Motion to Consolidate filed in the previous cases on November 6, 2009, which the Court has attached to this Opinion as Exhibit A for the convenience of the Superior Court and the parties. The Court permitted the joinder of the offenses in the previous case, because evidence of each of the prior cases would be admissible in a trial for the other to show common plan, scheme or design or to establish the identity of the perpetrator. See the Opinion and Order granting consolidation filed on March 29, 2010 at pages 6-7, which the Court has attached to this Opinion as Exhibit B. The Court also stated that joinder was proper on the basis that the evidence was admissible as a common plan or scheme in its appeal opinion that was filed in the previous cases on March 7, 2011. The Court is attaching the first nine pages of this Opinion as Exhibit C.

Moreover, on February 28, 2011, about a month before Appellant filed his

first motion to dismiss, the Commonwealth filed a notice of its intent to introduce “prior bad acts” evidence under Rule 404(b) in the present case. When all these documents of record are considered collectively, previous counsel certainly could have made an argument at the hearing on the first motion to dismiss that all the offenses in both cases constituted a single criminal episode because all the offenses were part of a common plan or scheme. Clearly, Appellant and his attorneys did not need to wait until the Commonwealth filed its appellate brief to make such an argument.

The Court also did not believe the mere fact that evidence of offenses in the prior prosecutions may be admissible under Rule 404 (b) to show identity or a common plan or scheme, renders all of the cases part of the same criminal episode. Although defense counsel did not specifically raise this issue in the first motion to dismiss, the Court indirectly addressed it in footnote 1 of the Opinion and Order entered May 19, 2011, wherein the Court stated:

The Court notes that the Commonwealth has filed a notice under Rule 404(b) of the Pennsylvania Rules of Evidence to admit evidence of Defendant’s prior “bad acts” with the victims from his previous cases. Even if the Court would permit the Commonwealth to introduce evidence of the prior crimes under Rule 404(b), it would not alter the Court’s conclusion that the current charges stem from separate criminal episodes than the original charges. See Spotz, 759 A.2d at 1285 (the mere fact that the prior killings were admissible for limited evidentiary purposes, such as to show motive, intent, identity and the sequence of events leading up to the murder of Ms. Amstutz, did not alter their independent nature; “accordingly, there was not such a ‘substantial duplication of issues of law and fact’ and duplicative witnesses in the four cases that joinder was required”).

The Court also briefly, but directly, addressed this issue in its Order denying Appellant’s second motion to dismiss when it stated: “The Court also does not agree with Defendant’s contention that a ‘common plan’ necessarily constitutes a single criminal ‘episode.’ The

former prosecutions and the current prosecution involve offenses against seven teenaged females over the course of an eight-year period. Again, the Court would rely on Commonwealth v. M.D.P., 831 A.2d 714 (Pa. Super. 2003).”

All of the sexual assaults took place at Appellant’s place of business and adjoining or nearby residence and most, if not all the victims came into contact with Appellant through his tire business. These facts were admissible in the previous cases to show a common plan, scheme or design in the manner in which Appellant selected his victims and the predatory nature of his crimes. Nevertheless, the previous convictions and the current offense involve separate criminal episodes. The crimes spanned a time period of eight or nine years and involved seven different teenaged females. None of the females were present during the assaults against the others and none of the assaults arose or grew out of the prior incidents. Just because Appellant used the same or similar methods to select his victims does not necessarily render seven separate sexual assaults against different victims that occurred over an eight-year period a single criminal episode.

Appellant also claims the trial court erred when it denied Appellant’s second motion to dismiss by failing to consider the Commonwealth’s binding judicial admission that Appellant’s acts constituted a common plan, scheme or design. This issue is without merit. The Court considered the Commonwealth’s admission, but disagreed with counsel’s argument regarding the import of that admission.

Counsel argued that the admission was new evidence, which justified a different result. When the Court denied Appellant’s second motion to dismiss, it initially noted that this alleged judicial admission was not “new evidence” because the issue of Appellant’s prior bad acts being part of a common plan or scheme was apparent in the case

long before the Commonwealth filed its appellate brief. The Court then briefly addressed the merits of Appellant's argument by disagreeing with Appellant's contention that the mere fact that bad acts evidence is admissible under Rule 404(b) as a common plan, scheme or design necessarily means that those acts constituted a single criminal episode and again relying on the M.D.P. case to conclude that this case and the previous cases, which spanned a period of at least 8 years and involved separate victims and some different charges, were separate criminal episodes.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

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